89- 1571

Supreme Court, U.S.
FILED
FEB 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

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William D. Allen, Petitioner,

v.

Office of Personnel Management, Respondent.

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Christine G. Allen, Petitioner,

v.

Department of the Treasury, Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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William D. Allen
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(503) 644-7041
Petitioner (pro se)

February 28, 1990

## QUESTIONS PRESENTED

1. Where 5 USC §7703 requires that the Federal Circuit "shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be *** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] obtained without the procedures required by law, rule, or regulation having been followed***"; did the Federal Circuit err in affirming an MSPB decision, which, on its face, did not comply with controlling MSPB and Federal Circuit decisional law?

2. Where the Merit System Protection Board requires that its administrative judges address and resolve evidentiary conflicts in their decisions, expressly including conflicting evidence relevant to witness credibility, did the Board's

administrative judge err in failing to resolve all conflicting evidence relevant to witness credibility?

3. Where the Federal Circuit rule for determining whether a form is confusing is "whether under the circumstances of a particular case, a reasonable person would be confused", did the Board's administrative judge err in failing to make that determination and by instead determining the meaning of the form using legal analysis?

## LIST OF PARTIES

The parties to the proceedings below were petitioners William D. and Christine G. Allen (deceased) and respondents Office of Personnel Management (OPM) and Department of the Treasury (Treasury) respectively.

William D. Allen represented himself pro se in Allen v. OPM, in which he appealed OPM's denial of survivor benefits for the government service of Christine G. Allen.

William Allen acted as his late wife's court-appointed personal representative in Allen v. Treasury, which challenged her resignation as involuntary. He entered as his wife's attorney at the Federal Circuit.[1]

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[1] The Federal Circuit ordered that Christine Allen be represented by counsel. However, it subsequently consolidated the petitioners' cases in the same decision in which the court agreed that the interests of both parties were substantially identical.

The Federal Circuit did not address the

He has been admitted to practice for insufficient time to qualify for admission to the Bar of the Supreme Court.

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merits of Allen v. Treasury (rather finding that its decision in Allen v. OPM also resolved Allen v. Treasury by application of collateral estoppel). Accordingly, the merits of Allen v. Treasury will not be addressed in this petition. A favorable decision in Allen v. OPM should result in remand of Allen v. Treasury to the Federal Circuit to address the merits of that case.

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## OPINIONS BELOW

The Federal Circuit's unpublished decision is reported at 891 F2d 298 (1989) [table], and is reprinted in the appendix hereto, p. A1 infra. The court's order denying reconsideration is appended at A11.

The Initial Decision of the Merit Systems Protection Board (Carol J. Teather, Administrative Judge) in Allen v. OPM has not been reported. It is reprinted in the appendix hereto, p. A11 infra.

The Final Decision of the full Board affirming Allen v. OPM without comment is reported at 39 MSPR 305 (1989) [table].

The Initial Decision of the Merit Systems Protection Board (Jennifer Gee, Administrative Judge) dismissing Allen v. Treasury has not been reported.

The Final Decision of the full Board affirming Allen v. Treasury without comment is reported at 36 MSPR 87 (1988) [table].

## JURISDICTION

The Merit Systems Protection Board had jurisdiction of the petitioners' separate MSPB appeals under 5 USC §7701 (Allen v. Treasury) and 5 USC §8347 (Allen v. OPM).

The full Board had jurisdiction over petitioners' separate petitions for review of the separate Initial Decisions in their cases under 5 USC §7701.

The United States Court of Appeals for the Federal Circuit had jurisdiction over the separate petitions for review of the separate Final Decisions of the full Board under 5 USC §1295 (a)(9) and 5 USC §7703.

This Court's jurisdiction to review the single judgment of the Federal Circuit affirming the petitioners' separate appeals is invoked under 28 USC §1254.

## STATUTE INVOLVED

5 USC §7703. Judicial Review of the Merit Systems Protection Board.

"******

"(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

"(1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(2) Obtained without the procedures required by law, rule, or regulation having been followed; or

"(3) unsupported by substantial evidence;

"******"

## STATEMENT OF THE CASE

I am the pro se petitioner, William D. Allen. I am an attorney admitted in Oregon within the last three years (and thus do not qualify for admission to the Bar of this Court). I am the surviving spouse of Christine G. Allen, a federal employee with the Internal Revenue Service (IRS) until her resignation August 2, 1985.

Christine, the other named petitioner herein, died in an auto accident August 6, 1985. Because of her earlier resignation, the Office of Personnel Management (OPM) refused to pay monthly survivor annuity payments under the Civil Service Retirement System (CSRS) or an accidental death benefit under Christine's Federal Employees Group Life Insurance (FEGLI) coverage.[2]

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[2]. OPM did, however, pay a "basic" FEGLI life insurance benefit, pursuant to extended FEGLI coverage that did not apply to the accidental death benefit.

I challenged the voluntariness of Christine's resignation on the ground that the IRS had misinformed Christine as to the consequences of an immediate resignation.[3] The IRS denied it had misinformed Christine.

I pursued the denied benefits first through the IRS, then through OPM appeals procedures, and then to the Merit Systems Protection Board (MSPB). I filed an MSPB appeal in both Christine's name and my own. The Board bifurcated that appeal sua sponte.

The two resulting appeals both turned on the identical question of whether

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[3]. In conversations with Christine before her death, she told me that she had asked Mildred Mathews, her supervisor, for 30 days unpaid leave (leave without pay--LWOP) for the purpose of retaining her employee benefits until she began a new job in late August 1985. Christine told me that Mathews had denied the leave but had advised Christine that she did not need to take LWOP to extend her benefits because her benefits would automatically continue for 31 days after resignation. Thus Christine saw no need to further pursue her LWOP request.

Christine's resignation had been voluntary. The Board dismissed Christine's appeal, Allen v. Treasury, for untimeliness, and on appeal both the full Board and the Federal Circuit affirmed.[4]

Allen v. OPM (my appeal) went to an MSPB evidentiary hearing. The testimony of Mathews (Christine's supervisor) and myself conflicted on material issues. Mathews conceded that her earlier sworn testimony at a pre-hearing deposition (that Mathews had not advised Christine that she would be entitled to extended FEGLI after resignation) had been incorrect. Mathews also conceded that prior to her deposition testimony, she had not seen IRS documents stating that Christine had been given such advice.

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[4]. I do not address the merits of Allen v. Treasury here because the Federal Circuit affirmed that case on the basis that the affirmance of Allen v. OPM precluded any further action in Allen v. Treasury.

I submitted into the record IRS documents (one of which is appended to this petition at p. A44) which tended to contradict Mathews' version of events and support my own. I also entered into the record two forms for refund of CSRS contributions which Christine and I had both signed (appended hereto at p. A45). I argued that the forms had been affirmatively misleading in suggesting that entitlement to a survivor annuity would continue for 31 days after resignation.

The MSPB administrative judge affirmed OPM's denial of survivor benefits. That decision is appended at p. A13. I appealed to the full Board, which summarily affirmed. I then appealed to the Federal Circuit, which affirmed in an unpublished opinion covering both my appeal and Christine's, P. A1, and later denied my timely petition for rehearing. P. A11.

The Federal Circuit stated that my "challenge" had been "phrased in terms of the administrative judge's critical findings not being supported by substantial evidence" but went on to state that I had actually sought a "retrial of the case and an overturning of the administrative judge's credibility determinations."[5]

The Federal Circuit's opinion simply failed to address assignments of error. Instead the court addressed and disposed of arguments I never raised.

The table of contents from my brief to the Federal Circuit in Allen v. OPM is appended at p. A41 in order that this Court

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[5]. The Federal Circuit noted that the administrative judge had written a "careful and convincing opinion" in finding that Mathews had been a "credible witness." The Federal Circuit found "no reason to reject the administrative judge's credibility determinations in this case" and "decline[d] to substitute our judgment for that of the administrative judge on factual issues."

be able to readily ascertain whether any of my ten assignments of error listed therein were "phrased in terms of the administrative judge's critical findings not being supported by substantial evidence."[6]

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[6]. My ninth and tenth assignments of error come closest to raising substantial evidence issues. The ninth (did not involve a critical issue, but rather indicated that the administrative judge had misunderstood Mathews' testimony as to who had selected the August 2, 1987 resignation date.

The tenth assignment of error was that the administrative judge had failed in her affirmative duty to develop the record.

5 CFR 1201.41(b)(5)(ii) requires that administrative judges "ensure that the record is developed on all significant issues." West v. OPM, 29 MSPR 355 (1985) and Hansen v. OPM, 35 MSPR 1 (1987) are in accord. Both cases involve overpayments to retirees, and in both cases, OPM failed to provide relevant evidence in the form requested by the administrative judge, whereupon the judges ruled for petitioners. The full Board held that administrative judges cannot render decisions without first fully developing the record.

> "[T]he Board has repeatedly held that administrative judges cannot escape their duty to render decisions that address the factual and legal matters presented." Hansen at 3.

## REASONS FOR GRANTING THE WRIT

Notwithstanding the unusual facts of my case, this case presents constitutional and statutory due process issues common to all MSPB appeals and to judicial review of Merit Systems Protection Board appeals.

Congress created the Merit Systems Protection Board to provide a fair but expedited process for resolving employee appeals, a process which appellants could pursue without counsel. Congress extended MSPB appeal procedures to non-employee appeals (i.e. retirement benefit appeals).

The MSPB adjudicates thousands of appeals every year, and the Federal Circuit reviews hundreds of those adjudications. Whether MSPB appellants are accorded due process in MSPB proceedings, therefore, has importance beyond the facts of this case. The same applies to Federal Ciruit judicial review of MSPB decisions.

In Arnett v. Kennedy, 416 US 134, 94 SCT 1633, 40 LEd2d 1594 (1973), this Court recognized that federal employees had a due process interest in their employment. The Court held that the due process procedures for protecting that interest were those provided for in the same statute that created the interest.

Regulations and decisional rules adopted to implement such a statutory right will also become part of the appellant's statutory due process right. Agencies are bound by their own validly adopted rules. In Service v. Dulles, 354 US 363, 1 LEd2d 1403, 77 SCt 1152 (1957) this Court ruled that although Secretary of State had absolute statutory authority to discharge employees for security reasons, the Secretary's failure to follow the State Department's own regulations in processing Service's dismissal rendered the dismissal

invalid, notwithstanding that the Secretary had been under no obligation to adopt regulations imposing substantive and procedural standards restricting his absolute statutory authority.

Arnett and Service should apply equally to MSPB appeals brought by persons other than federal employees, including claimants for retirement system benefits. See e.g. Lindahl v. Office of Personnel Management, 470 US 768, 105 SCt 1620, 84 LEd2d 674 (1985) (Judicial review of MSPB decisions not confined to appeals by employees and applicants for employment).

**I. In failing to address petitioner William Allen's assignments of error and instead disposing of his appeal on a ground that he did not argue, the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.**

I concede, as I did at the Federal Circuit, that substantial evidence supported the administrative judge's decision.[7] My assignments of error have always been that the administrative judge failed to follow procedures mandated by MSPB and Federal Circuit decisional law.

The administrative judge's failures to follow controlling decisional law are errors that are plain on the face of her decision. In ignoring my assignments of error and in failing to hold the Board to the Board's own

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7. That makes the Federal Circuit's characterization of my appeal as being phrased in terms of substantial evidence especially ironic.

procedures,[8] the Federal Circuit violated its statutory mandate under 5 USC §7703 and denied me due process of law.

That violation by the Federal Circuit constituted a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Sup.Ct.R. 17.1(a)

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8. The Federal Circuit panel's questioning at oral argument suggested to me that the panel considered that adherence to the Hillen prodecures, infra, would impose an unreasonable burden upon MSPB administrative judges.

**II. In failing to require the Merit System Protection Board to adhere to its own procedures for MSPB appeals in the conduct of Allen v. OPM, the Federal Circuit has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Courts' power of supervision.**

In my argument below, I will address evidence that I presented to the MSPB. My purpose is not, as the Federal Circuit stated in its opinion, to seek a retrial of that evidence. It is to demonstrate that the MSPB administrative judge failed to properly address and resolve that evidence.

These examples are only illustrative. For the sake of brevity, I will directly address only a few of the administrative judge's procedureal errors in this case. As can be noted from the table of contents from my Federal Circuit brief, I addressed several other procedural errors in my Federal Circuit brief.

**CREDIBILITY ASSESSMENTS**

I assigned as error that the administrative judge had violated my right to due process by failing to follow controlling Board decisional law that required her to address and resolve all evidence, expressly including conflicting evidence relevant to witness credibility.

That controlling decisional law, which is binding on the Board's administrative judges, is found in Hillen v. Dept. of Army, 35 MSPR 453 (1987). In that sexual harrassment case, an MSPB administrative judge heard conflicting testimony by an accused supervisor and by complaining witnesses. The administrative judge ruled for the accused, relying on the accused's self exculpatory testimony and explaining that he found the accused to be a credible witness. The Board reversed for the judge's failure to explain in detail why he had

credited the supervisor's testimony over that of the complainants. The Board stated the following procedures to be followed by administrative judges in making credibility determinations:

> "To resolve credibility issues, an administrative judge must[:]
> first identify the factual questions in dispute;
> second, summarize all of the evidence on each disputed question of fact;
> third, state which version he or she believes; and,
> fourth, explain in detail why the chosen version was more credible than the other version or versions of the event.
>
> Numerous factors, which will be considered in more detail below, must be considered in making and explaining a credibility determination. These include:
> (1) The witness's opportunity and capacity to observe the event or act in question;
> (2) the witness's character;
> (3) any prior inconsistent statement by the witness;
> (4) a witness's bias, or lack of bias;
> (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence;
> (6) the inherent improbability of

the witness's
version of events; and
(7) the witness's demeanor.

Hillen at 458 (emphasis added). Hillen establishes that in resolving conflicting testimony, a mere statement that an administrative judge finds a witness credible will not suffice. Administrative judges must address and resolve conflicting evidence relevant to credibility in their decisions. The written decision in Allen v. OPM establishes that the administrative judge did not follow the Hillen procedures.

**The Demaduk Memorandum**

At the hearing, I provided several IRS documents which did not accord with Mathews' testimony, including the October 31, 1985 IRS memorandum appended at p. A44. The memorandum was written by IRS personnel officer Christine Demaduk to summarize a meeting with Mathews apparently to address one of my letters challenging the validity

of Christine's resignation.

That memorandum indicates that LWOP was discussed in connection with extended benefits and that Christine was told that she would have health and life insurance benefits for 31 days after she resigned.

This is the only IRS document that the administrative judge addressed in her opinion. The administrative judge ignored the reference to LWOP and focussed on the statement concerning health and life insurance benefits as confirming Mathews' testimony concerning those benefits.

It is ironic that the administrative judge missed the point that after having a chance to view this document (and others in the IRS file) for the first time, Mathews reversed her sworn deposition testimoney that she had not advised Christine that life insurance coverage would continue after resignation. She admitted that she had not

seen the appended memo or other documents prior to the earlier deposition. Rather than the memorandum confirming Mathews' testimony, Mathews changed her testimony to conform to the memo. In this respect, at least, Mathews herself found the memorandum more accurate than her own recollection, but the administrative judge completely ignored or overlooked that fact.[9]

Notwithstanding that the administrative judge wrote a lengthy and detailed opinion, she generally ignored almost all evidence relevant to Mathews' credibility (except for misinterpreting the significance of the appended memorandum) other than Mathews'

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[9]. The appended memorandum is one of several IRS documents that are inconsistent with Mathews' testimony. My federal circuit brief discusses the applicability of the other Hillen factors at some length. My discussion of Mathews' change of testimony and the inconsistency of her testimony with the appended memorandum is intended to be exemplary rather than exhaustive.

demeanor. As the Hillen quote supra indicates, demeanor is only one of several factors (and the last listed) to be considered in assessing witness credibility.

Had the Board not adopted its Hillen procedures, MSPB credibility findings would remain "virtually unreviewable." However, although the Board was under no obligation to adopt those procedures, which would limit administrative judges' broad discretion in assessing witness credibility, the Board did adopt such procedures in Hillen.[10] Thus,

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[10]. Although Hillen is a relatively recent decision, it already has dozens of progeny which restate and apply the Hillen procedures. See, e.g. Furlough v. Dept. of Army, 39 MSPR 377 (1988) (Board reversed because administrative judge failed to explain why agency witnesses were more credible); Barthel v. Dept. of Army, 38 MSPR 245 (1988) (Board reverse because administrative judge failed to resolve conflicting testimony concerning substance of retirement counselling; Cardioli v. Dept. of Navy, 38 MSPR 377 (1988) (Board reversed because administrative judge did not explain why supervisor's testimony was more credible than the appellant's); Allen v. Department

there is now "law to apply" in reviewing administrative judges' credibility findings. Because her pivotal credibility assessment did not comply with Hillen, it was "obtained without following the procedures required by law, rule, or regulation." 5 USC §7703(c)(2). Had the administrative judge's adhered to those procedures and addressed and resolved all conflicting evidence, her decision might have been different.[11]

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of Agriculture [no relation], 37 MSPR 234 (1988) (Board reversed because administrative judge failed to resolve credibility conflict between appellant and supervisors' testimony); Bonds v. USPS, 38 MSPR 80 (1988) (Board reversed because administrative judge failed to resolve direct conflict in testimony and to address bias of agency witnesses); and Lockett v. USMC, 37 MSPR 427 (1988) (Board reversed because the administrative judge failed to make credibility determinations in crediting agency witnesses' testimony over that of the appellant.

11. My testimony as to Christine's version of events and the refund forms and other documents I submitted constituted at least substantial evidence to support a different decision. The administrative

**Refund Forms**

I also assigned as error the administrative judge's failure to apply the appropriate standard in evaluating OPM forms that Christine and signed to obtain a refund of her CSRS contributions. A copy of these forms is appended. P A45. I argued that the forms had been affirmatively misleading as to continued entitlement to a survivor annuity until the refund was paid.

In MSPB proceedings, the appropriate standard for determining whether forms are misleading is found in Frantz v. OPM, 778 F2d 783, 786 (FedCir 1985). The test is "whether under the circumstances of a particular case, a reasonable person would be confused". The administrative judge's decision shows that she did not apply this test. Rather than deciding whether under

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judge's errors were not harmless.

the circumstances in which Christine and I found ourselves,[12] a reasonable person would have been confused by the forms, the administrative judge merely interpreted the forms with the benefit of her legal education and experience. The Frantz test determines whether a form is confusing, regardless of how a lawyer might interpret the forms. These are entirely different questions.

A determination that the forms had been confusing would have provided grounds for finding that Christine had been misled as to the effect of resigning upon her entitlement to a survivor annuity. The administrative judge's failure to make that determination, therefore, was an error requiring reversal.

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[12]. Christine and I signed these forms a month before I was began law school. Neither of us had any legal training.

## CONCLUSION

The Merit Systems Protection Board and the Federal Circuit apparently feel that an evidentiary hearing and a lengthy written decision satisfied any entitlement I might have to due process of law, either under the statutes or under the Constitutional. They are wrong. More is required than a lengthy decision, especially where that decision establishes on its face that the administrative judge did not follow the procedures required by law.

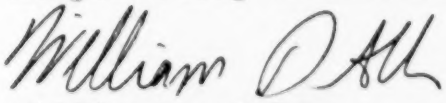
The administrative judge did not follow the required procedures. Had she addressed and resolved all the evidence that did not accord with her decision, she might well have might well have come to an opposite conclusion. Her failure to follow the required procedures, therefore, cannot be characterized as harmless error.

The Board and the Federal Circuit did validly adopted procedures by adjudication; and I was entitled to have those procedures followed in my appeal.

The Federal Circuit's failure to even address these matters on appeal is so serious a departure from the accepted and usual course of judicial proceedings as to call for the Supreme Court to exercise its power of supervision over the Federal Circuit to ensure that that court fulfills its constitutional and statutory duties.

I respectfully pray that the writ be issued.

Respectfully submitted,



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**APPENDIX - 1**

**Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.**

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

**89-3144**

**WILLIAM D. ALLEN,**
**Petitioner**

**v.**

**OFFICE OF PERSONNEL MANAGEMENT,**
**Respondent,**

**and**

**DEPARTMENT OF THE TREASURY**
**Intervenor.**

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**88-3158**

**CHRISTINE G. ALLEN,**
**Petitioner,**

**v.**

**DEPARTMENT OF THE TREASURY,**
**Respondent.**

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**DECIDED: November 1, 1989**

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**Before RICH, Circuit Judge, FRIEDMAN, Senior Circuit Judge,* and MICHEL, Circuit Judge.**

**FRIEDMAN, Senior Circuit Judge.**

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***Judge Friedman took senior status on November 1, 1989.**

[page 2] DECISION

The decisions of the Merit Systems Protection Board (Board) in docket Nos. SE08318810288 and SF07528710422 that (1) affirmed the denial by the Office of Personnel Management (OPM) of the appellant William Allen's application for a survivor annuity, and (2) dismissed the appellant Christine Allen's appeal as untimely, are affirmed.

OPINION

Both of these cases grow out of the appellant Christine Allen's resignation from the Internal Revenue Service (IRS) four days before her death in an automobile accident. In each case the resignation is challenged as involuntary. Because most of the factual and legal issues in the cases are identical, and the cases are closely interrelated, we decide them in a single opinion.

APPENDIX - 3

I.

A. The Background Facts. William Allen, a career Marine, was scheduled to retire from the Marine Corps in the fall of 1985, after which he planned to attend law school in Oregon. His wife Christine Allen was a tax auditor with the IRS in California. After Christine Allen tried unsuccessfully to transfer to an IRS office in Oregon, in July 1985 she obtained a non-government position in that state.

Upon her return to California, on July 31, 1985 she submitted her resignation effective August 2, 1985. On August 6, 1985, she was killed in an automobile accident while traveling to Oregon. [page 3]

B. William D. Allen v. Office of Personnel Management, No. 89-3144. Following Christine Allen's death, William Allen applied to OPM for survivor benefits. OPM denied benefits because at the time of her death Christine Allen was neither a

federal employee nor a federal annuitant.

William Allen appealed OPM's denial of benefits to the Board. He contended that Christine Allen's resignation was involuntary because it was based on misinformation given her by IRS that all of her benefits, including survivor benefits, would continue for 31 days after her resignation.

After a hearing, the Board's administrative judge affirmed the denial of survivor benefits and the Board denied review. In a lengthy opinion that turned mainly upon credibility determinations, the administrative judge reviewed the evidence in detail and found that William Allen "has failed to establish that Christine would not have resigned on August 2, 1985, except for misinformation or deception on the part of OPM or the IRS with respect to a survivor annuity or accidental death benefits. A preponderance of the evidence shows that Christine's resignation was voluntary."

Allen v. OPM, No. SE 08318810288, slip op. at 15 (MSPB June 7, 1988).

C. Christine G. Allen v. Department of the Treasury, No. 88-3158. After OPM told William Allen that he was not eligible for a survivor annuity because Christine Allen was no longer a government employee at the time of her death, William Allen asked the IRS to rescind his wife's resignation as involuntary. [page 4] He stated that the IRS had misrepresented to her that all her benefits, including a survivor's annuity, would continue for 31 days after her resignation. He further stated that she would not have resigned had she known that survivor annuity benefits would terminate upon her resignation. The IRS denied his request but did not notify him of his right to appeal to the Board.

William Allen filed an appeal to the Board from the IRS ruling on March 16, 1987, more than 18 months after Christine Allen's

resignation. The administrative judge denied the appeal as untimely and the Board denied review. The administrative judge found that "Mr. Allen failed to exercise due diligence in the filing of the appeal" and had not shown good cause for waiving the 20-day time limit for appeal. Allen v. Treasury, No. SF 07528710422, slip op. at 2 (MSPB May 26, 1987). The administrative judge pointed out that although William Allen in September 1986 was "aware that alleged involuntary resignations based on misinformation could be appealed to the Board," "[h]e did not file this appeal until March 16, 1987, five and one-half months later." Id. at 3.

II

A. William Allen v. Office of Personnel Management. Although phrased in terms of the administrative judge's critical findings not being supported by substantial evidence, William Allen's challenge of the Board's

decision that he had not established that Christine Allen's resignation was involuntary actually seeks a retrial of the case and an overturning of the [page 5] administrative judge's credibility determinations. We decline to substitute our judgment for that of the administrative judge on factual issues.

Christine Allen's supervisor, Ms. Mathews, testified that in discussing her upcoming resignation, Christine Allen was concerned about maintaining her health benefits because of prior health problems; that Ms. Mathews checked with the personnel office and was told that Christine Allen's health and insurance benefits would continue for 31 days after resignation; and that she so informed Christine Allen. Ms. Mathews also testified that Christie Allen had not requested that she be placed on leave without pay instead of resigning when she stopped working; William Allen testified

that Christine Allen told him that she had requested, but been denied, leave without pay.

The administrative judge found that Ms. Mathews was "a credible witness." Allen v. OPM, slip op. at 11. Such credibility determinations are subject to reversal by this court only in exceptional circumstances. DeSarno v. Department of Commerce, 761 F.2d 657, 661 (Fed. Cir. 1985); Griessenauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985). We have no reason to reject the administrative judge's credibility determinations in this case. The administrative judge wrote a careful and convincing opinion, concluding that Christine Allen's resignation was not involuntary. We affirm that decision on the basis of that opinion.

B. In the other case, Christine Allen, appearing through William Allen as her representative, argues that the Board erred

in finding [page 6] that she had not shown good cause for the untimely filing of her appeal. We need not decided that question, however. Even if her appeal to the Board were deemed timely, we agree with the government that she would be collaterally estopped from litigating before the Board the voluntariness of her resignation.

The Board has authority to and does apply collateral estoppel. Thomas v. General Servs. Admin., 794 F.2d 661, 664 (Fed. Cir. 1986). The doctrine "is normally applicable if (i) the issue previously adjudicated is identical with that now presented, (ii) that issue was 'actually litigated' in the prior case, (iii) the previous determination of that issue was necessary to the end-decision then made, and (iv) the party precluded was fully represented in the prior action." Id. Here, as in Thomas, "all these requirements are met." Id.

Christine Allen conceded that the

voluntariness issue, and the evidence thereto, is the same in both cases. The issue was fully litigated in the case brought by William Allen, and we have affirmed the Board's decision in that case that the resignation was not involuntary. The Board was required to determine that issue in deciding William Allen's case. Finally, Christine Allen's position on the involuntariness issue was fully represented by William Allen in his case. Indeed, in her brief in her case, Christine Allen states that "William and Christine's Interests Coincide." [page 7]

Thus, there is no reason to doubt that if the Board were to reach the merits of the voluntariness issue in Christine Allen's appeal, it would rule that she was collaterally estopped from relitigating that issue. Any possible Board error in refusing to waive the time limit for her appeal therefore was harmless.

**APPENDIX - 11**

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

**89-3144**

**WILLIAM D. ALLEN,**

**Petitioner**

**v.**

**OFFICE OF PERSONNEL MANAGEMENT,**

**Respondent,**

**v.**

**DEPARTMENT OF THE TREASURY**

**Intervenor.**

---

**88-3158**

**CHRISTINE G. ALLEN,**

**Petitioner,**

**v.**

**DEPARTMENT OF THE TREASURY,**

**Respondent.**

O R D E R

**APPENDIX - 12**

**O R D E R**

Before FRIEDMAN, Circuit Judge, RICH, Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

ss_____
Francis X. Gindhart
Clerk

Dated: December 1, 1989

cc: WILLIAM D. ALLEN
THEODORE R. CARTER, III

ALLEN V. TREASURY, 88-3158 & 89-3144

***

**APPENDIX - 13**

**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**SEATTLE REGIONAL OFFICE**

| | | |
|---|---|---|
| WILLIAM D. ALLEN, Appellant, | ) | |
| v. | ) | DOCKET NUMBER |
| OFFICE OF PERSONNEL MANAGEMENT, Agency, | ) | SE08318810288 |
| DEPARTMENT OF THE TREASURY, Intervenor. | ) | DATE: June 7, 1988 |
| (CSF 1 626 070) | ) | |

William D. Allen, Beaverton, Oregon, pro se

John E. Landers, Chief, Retirement Policy Division, Washington, D.C., for the agency.

Jim D. Newman, Esquire, Internal Revenue Service Regional Counsel, San Francisco, California, for the Intervenor.

BEFORE

Administrative Judge Carol J. Teather

INITIAL DECISION

INTRODUCTION

By petition filed April 7, 1988, appellant appealed the February 24, 1987, reconsideration decision of the Office of Personnel Management (OPM) denying his application for survivor annuity benefits. The Board has jurisdiction over [page 2]

appellant's appeal of this issue under 5 U.S.C. §§ 7701(a) and 8347(d) and 5 C.F.R. § 831.110 (1988).[1]

Appellant also appealed the denial of his claim for Accidental Means Death Benefits. The Board lacks jurisdiction over this issue. See 5 C.F.R, Part 870 (does not provide appeal rights to the Board); 5 C.F.R. § 870.205(f) (1988)[2] Cf. Lee v. Office of Personnel Management, 32 M.S.P.R.

---

[1] Appellant previously had filed a timely appeal which was dismissed without prejudice to his refiling within twenty days of the date of a final Board decision on an appeal taken on behalf of his deceased wife challenging her resignation as involuntary. See Allen v. Office of Personnel Management, MSPB Initial Decision No. SE08318710178 (April 30, 1987). This is the second appeal timely refiled. The information submitted in the prior case was incorporated in the instant case by reference. Order date March 8, 1988, tab 11, Board File. The term "Board File" refers to the record in this case, Docket No. SE08318810288, and the term "Board File I" refers to the record in the prior appeal, Docket No. SE08318710178.

[2] Unless so stated, there is no change in the regulations cited between 1985 and 1988.

149, 152 (1987) (OPM decisions concerning Federal health insurance benefits and its administration of the Federal Employee Health Benefit Program are final and are not reviewable by the Board.). The Board only has such jurisdiction as is provided to it by law, rule or regulation. Rosano v. Department of the Navy, 699 F.2d 1315, 1318 (Fed. Cir. 1983).

Pursuant to appellant's request, a hearing on his appeal was held on May 23, 1988, in Portland, Oregon. For the reasons set forth below, OPM's decision is AFFIRMED.

[page 3] FINDINGS AND ANALYSIS

Background

Appellant, a career Marine, was scheduled to retire from the Marine Corps in the fall of 1985. Following retirement, he planned to attend law school in Oregon. His wife, Christine Allen, was a Tax Auditor with the Internal Revenue Service (IRS) in Santa Ana, California. They have three children.

Christine planned on accompanying her husband to Oregon. Therefore, beginning in 1984, she attempted to obtain a transfer to an IRS office in Oregon. She was unsuccessful, as the IRS was not hiring tax auditors in Oregon at that time.

In July 1985, Christine visited the IRS office in Portland, Oregon, and learned that no auditors would be hired until the following calendar year. Upon receiving this information, Christine obtained a job in Portland with a private employer, Safeco Insurance Company. She was to start work there in late August.

After securing employment in Oregon, Christine returned to California and gave the IRS two weeks notice that she would be leaving. She submitted her resignation on July 31, 1985. The effective date on the resignation form is August 2, 1985, Christine's last day of work as a Tax auditor.

On August 6, 1985, Christine died in an

automobile accident while traveling to Portland, Oregon. Appellant applied for survivor benefits which were denied because Christine was neither an annuitant nor a Federal employee at the time of her death. Appellant appealed OPM's decision stating that his wife's resignation was involuntary as it was based on the misunderstanding that all of her employee [page 4] benefits would continue for 31 days following the termination of her employment.

Applicable requirements for a survivor annuity.

Appellant's right to a survivor annuity is dependent upon the employment status of his deceased wife Christine. As OPM noted in its decisions, a surviving spouse of a Federal employee, not an annuitant,[3] is eligible for a survivor annuity only if the

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[3] It is undisputed that Christine Allen had not retired under the Civil Service Retirement Act. Thus 5 U.S.C. § 8341(b)(1) is not applicable.

employee-spouse (1) had completed at least 18 months of qualified civilian service, and (2) died while still employed by the Federal Government.[4] 5 U.S.C. § 8341(d). It is undisputed that the first requirement is met. the question is whether Christine Allen's resignation was voluntary.

Applicable law on voluntariness of a resignation.

An involuntary resignation is a removal. Burgess v. Merit Systems Protection Board, 758 F.2d 641, 643 (Fed. Cir. 1985). Thus, the effect of establishing Christine's resignation as involuntary would be to void the resignation and reinstate her Federal employee status. See Schultz v. United States Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987).

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[4] Appellant has the burden of establishing by preponderant evidence his entitlement to a survivor annuity. See Huskey v. Office of Personnel Management, 27 M.S.P.R. 363, 365 (1985), aff'd, 790 F.2d 92 (Fed. Cir. 1986) (Table).

> The test for an involuntary action is:
>
> (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.

[page 5] Leone v. United States, 204 Ct.Cl. 334, 339 (1974), quoting Furhauf Southwest Garment Co. v. United States, 111 F.Supp. 945, 951, 126 Ct.Cl. 51, 62 (1953). See Davis v. Department of Health & Human Services, 30 M.S.P.R. 268, 270 (1986), aff'd, 809 F.2d 791 (Fed. Cir. 1986) (Table) (test for determining involuntariness where coercion by the agency is alleged).

A resignation can also be rendered involuntary by misinformation provided by the employing agency. See Dumas v. Merit Systems Protection Board, 789 F.2d 892, 894 (Fed. Cir. 1986); Scharf v. Department of the Air Force, 710 F.2d 1572 (Fed.Cir.1984). In its decision in Covington v. Department of Health and Human Service, 750 F.2d 937,

941-942 (Fed. Cir. 1984), the Court stated:

> To determine whether a retirement (resignation) is voluntary, a court must examine "the surrounding circumstances to test the ability of the employee to exercise free choice". ... The fact that an employee is faced with an inherently unpleasant situation or that his choice is limited to two unpleasant alternatives does not make an employee's decision any less voluntary. ... But the decision must ultimately be the employee's decision, not the government's; whether the employee made an informed choice is the touchstone of our analysis. ... A resignation or retirement is involuntary if it is obtained by agency misinformation or deception." (citations omitted).

In the instant case, appellant alleges that the effective date of Christine's resignation, August 2, 1985, was the result of misinformation or deception on the part of the IRS.

Christine's resignation was voluntary.

Christine Allen made the final decision to resign from [page 6] her position with the Internal Revenue Service when she took the job with a private employer in Portland, Oregon. Her resignation decision wns not

based on any information, or lack thereof, regarding employee benefits provided by her supervisor. The IRS had no vacancies in Oregon for a tax auditor and, as discussed below, Christine did not request LWOP. Furthermore, Christine was not "coerced" into resigning by the IRS's failure to provide her with a job in Oregon or LWOP. Furthermore, she had a choice; she could have remained in her position with the IRS in California up until the starting date of her new position in Oregon,[5] requested leave, or grieved any denial of LWOP she felt was unwarranted. There is no evidence that the agency ever threatened Christine with adverse action if she did not submit her resignation. Cf. Schultz v. United States Navy, 810 F.2d 1133 (Fed. Cir. 1987) (immediate resignation tendered for health

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[5] Appellant testified that his wife could have continued to work in California and that they had discussed this possibility.

reasons because agency denied leave and threatened to bring adverse action for absence without leave).

The question is whether the timing of Christine's resignation, i.e., the effective date, was the result of misinformation or deception on the part of the IRS. In support of his position, appellant cited numerous cases where misinformation or lack of information given to an individual by OPM or the individual's employing agency rendered a resignation or retirement involuntary. However, in each of these cases, the employee involved was seeking certain information and basing his or her decision to resign or retire at a particular time on the information provided. This is not what occurred in the instant case.

[page 7] Appellant testified that he realized that if Christine left her job with the IRS before starting her new job in Portland, there might be a period of time

where there was no benefit coverage. He further testified that he discussed this fact with his wife and urged her to seek leave without pay (LWOP) until she started her new job.[6] Christine asked her supervisor, Mildred Mathews, for LWOP but her request was denied; she was told she did not need such leave as her employee benefits would continue for 31 days following termination. Christine then submitted her resignation on July 31, 1985, on the understanding that all of her employee benefits would continue for 31 days following termination. According to appellant, two OPM forms with respect to refund of retirement contributions which were given to Christine, when she informed her supervisor that she was leaving, contributed to their (his and Christine's)

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[6] It is undisputed that Christine had used up all her sick and annual leave. See testimony of Mildred Mathews and document number 24 under tab 3, Board File I.

misunderstanding that all employee benefits, including survivor benefits, would continue for 31 days following termination. Appellant was, therefore, shocked to learn, after Christine's death, that entitlement to accidental death benefits and a survivor annuity ended on the effective date of Christine's resignation. Testimony of Appellant.

Christine chose the effective date of her resignation, making it her last working day with the IRS.[7] Testimony of Mildred Mathews. A preponderance of the evidence shows that she was not concerned about survivor benefits or accidental death. Rather, her concerns were centered around medical coverage and obtaining a refund of her retirement contributions so that she could put a down payment on a home [page 8]of her own.

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[7] Appellant contends that the effective date of August 2, 1985, was invalid as it was a work day for Christine. This is an error. Christine's resignation became effective the close of business on August 2, 1985.

Furthermore, Christine never requested leave in order to extend her resignation date beyond the date of the last working day.

Mildred Mathews, Christine's supervisor, testified that when Christine returned from Oregon in July 1985, she told Ms. Mathews that she had a new job and would be leaving the IRS. Christine was excited about the changes in her life, moving to Oregon, and taking on a new job.[8] As Christine had experienced health problems, Ms. Mathews was concerned about her medical coverage and asked her when she would be covered on her new job. Christine said medical coverage began when she started work. Ms. Mathews then called the agency's labor relations office, spoke with Christine Demaduk, and learned that health benefits and life insurance would continue for 31 days

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[8] Christine found the Tax Auditor job with the IRS in California extremely stressful. Testimony of Mildred Mathews and appellant.

following Christine's termination. She passed this information on to Christine. Neither accidental death nor survivor benefits were ever discussed or even mentioned. Testimony of Mildred Mathews.

Ms. Mathews further testifies that Christine told her she (Christine) had found a house in Oregon she was interested in buying.[9] Christine also told her that she wanted to withdraw her retirement contributions as she and her husband planned on using the refund for a downpayment on a house. Ms. Mathews gave her the forms for this purpose and informed Christine that both she and her husband would have to sign the forms.[10] Ms. Mathews also testified that she gave Christine no annuity advice and did not discuss the [page 9] subject of

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[9] Christine called it a "fixer upper." Testimony of Ms. Mathews.

[10] Ms. Mathews [sic] testimony in this regard is confirmed by appellant.

survivor benefits at all. According to Ms. Mathews, she would not advise an employee regarding annuity benefits as her knowledge of the subject was limited to the fact that, upon termination of Government service, an employee has the option of leaving his or her retirement contributions in the fund or withdrawing them. Thus, it appears that if Christine had, in fact, expressed an interest in survivor benefits, Ms. Mathews would have sought advice from labor relations, as she did in the case of extended coverage for health benefits and life insurance. She did not do so. Testimony of Mildred Mathews; stipulation with respect to Christine Demaduk testimony, Appellant Exhibit 56; Appellant Exhibit 16.

Ms. Mathews testified that Christine never requested LWOP. The only time the matter of LWOP came up in her discussions with Christine was in January or February of 1985. At this time, Christine was

attempting to transfer to an IRS office in Oregon and Ms. Mathews asked her what she would do if she could not get a transfer. According to Ms. Mathews, they had a general discussion about LWOP, nothing specific.

Finally, Ms. Mathews testified that at the end of July 1985, Christine filled out the second page of a resignation Form 52, giving the reason for her resignation as:

> Husband retiring from Marine Corp - going to Law School in Portland, Oregon Unable to transfar [sic] to office there as they were overrealized.

Christine signed the form and dated it July 31, 1985. Ms. Mathews further testified that she asked Christine what the effective date of her resignation was and, when Christine told her, she (Mathews) wrote it on the form. The effective date Christine gave was August 2, 1985. See Appellant Exhibit 10.

[page 10] Appellant contends that his wife did not intend to have her resignation

effective August 2, 1985, and only agreed to that date because she understood that all her employee benefits would continue for 31 days. Appellant also contends that Ms. Mathews's testimony is contradicted by an October 31, 1985, memorandum prepared by Christine Demaduk regarding a meeting between herself, Doug Turkot and Millie (Mildred) Mathews to discuss Christine's resignation. This memorandum indicates that Ms. Mathews said that Christine (Allen) was concerned about her life and health insurance and that when she (Ms. Mathews) contacted Ms. Demaduk she was told that an employee was covered for 31 days after they quit for health and life and life insurance. See Appellant Exhibit 16.

I do not find that the above referenced memorandum renders Ms. Mathews testimony regarding her conversations with Christine incredible. The memorandum is only a summary of information passed on by Ms.

Mathews during a meeting. It is not a record of Ms. Mathews's actual statements. Also, the memorandum was not prepared by Ms. Mathews but, rather, by another individual. Thus, it represents that individual's impression of what information was given by Ms. Mathews. Furthermore, even if it is an accurate summary of Ms. Mathews comments, it only establishes the fact that during her discussions with Christine concerning her resignation, the matter of health benefits and life insurance coverage was discussed. There is no dispute as to this fact. Ms. Mathews testified that she told Christine that her health and life insurance benefits would continue for 31 days following her resignation. This was an accurate statement. It is undisputed that an employee's basic life insurance and health insurance benefits continue for 31 days following the termination of employment.

[page 11] I found Ms. Mathews to be a

credible witness. She testified in a frank straightforward manner and appeared to make a considerable effort to remember and testify accurately as to what occurred during her discussions with Christine. In addition, much of her testimony is supported by other evidence. The record shows that Ms. Mathews assisted Christine in her attempts to obtain a transfer[11] and liberally granted her LWOP when she needed it for illness or job searches.[12] Ms. Demaduk confirmed the testimony that Ms. Mathews checked on extended health benefit coverage for Christine to ensure that she was covered until she began her new job.[13]

The statements of Ms. Mathews regarding her general discussions with Christine about

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[11] Testimony of Mildred Mathews; Appellant Exhibits 2 and 3; Intervenor Exhibit I-A.

[12] See document 24 under tab 3, Board File I.

[13] See Appellant Exhibit 16.

LWOP in January or February 1985 are supported by the testimony of appellant and the evidence showing Christine was seeking a transfer to Oregon at that time. An employee thinking she has a chance for another Government position would likely be attempting to stay on the rolls as long as possible in order to facilitate such a transfer. On the other hand, the fact that Christine had accepted a job in the private sector which would begin in August 1985, lends support to Ms. Mathews's testimony that Christine did not request LWOP following her return from Oregon in July. Christine would have little need for leave in view of the fact that coverage for health benefits and life insurance was extended for 31 days following termination.[14] Finally,

---

[14] Ms. Mathews testified that the primary concern was medical coverage. According to Ms. Mathews, she (Mathews) used the two terms "health benefits and life insurance" together because labor relations always referred to these two benefits as one.

Christine had found a house in [page 12] Oregon she was interested in buying and had applied for a refund of her retirement contributions in order to make a down payment.[15] Since payment of a refund of retirement contributions cannot occur before 31 days after termination,[16] it seems unlikely that Christine would make a request for LWOP which would only serve to delay payment of the refund. Based on a review of the record as a whole, I find it more likely to be true than not true that Christine was not concerned about survivor benefits at the time she submitted her resignation and did not make a formal request for LWOP.[17]

Appellant testified that his wife told

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[15] See testimony of Mildred Mathews and appellant; Appellant Exhibit 7.

[16] See Appellant Exhibit 7.

[17] It is possible that she may have raised the subject without making an actual request in connection with a concern over medical coverage.

him that she had asked Ms. Mathews for LWOP and that Ms. Mathews had said No; she did not need to take such leave as coverage for health benefits and life insurance was extended. However, appellant also testified that he felt LWOP was important; he wanted her to get 30-days LWOP, and that he continuously kept asking her about it. Under these circumstances, it may well be that Christine simply told him that she had requested LWOP and that it had been denied in order to get him off the subject. Such a finding is supported by appellant's testimony to the effect that (1) his wife found her job with the IRS stressful, (2) she was looking forward to the change of location and job, (3) owning her own home was a major goal in his wife's life, (4) it was his wife's responsibility to find a house in August before he had to [page 13] start law school, and the fact that LWOP would not assist his wife in regards to her

resettlement plans.

Appellant also contends that his wife did not pursue a request for LWOP because of misleading information provided by the OPM forms pertaining to refund of retirement contributions. See Appellant Exhibit 7. According to appellant, he and his wife interpreted the following language on the forms to mean that survivor benefits would continue for 31 days after termination:

> Form 1425 -
> "payment of the refund would end the entitlement of a former spouse to a survivor annuity;"
>
> "Payment of the refund will end any eligibility your former spouse(s) may have to coverage under the Federal Employees Health Benefits Program;"
>
> "refund is not payable until at least 31 days have passed since your separation;" and
>
> Form 1537 -
> "Payment of the refund of retirement deductions will end any entitlement you may have to a survivor annuity or portion of any annuity to which the applicant would otherwise have been entitled." (emphasis added).

Appellant Exhibit 7. The forms refer to

cessation of "entitlement" and "eligibility" for a survivor annuity. They do not discuss, set forth, or make any reference to what constitutes "entitlement" or "eligibility" for a survivor annuity. Thus it seems reasonable that a person would look elsewhere to determine if he or she had entitlement or eligibility for a survivor annuity that would be lost on payment of the refund. Christine, however, made no such inquiry. Ms. Mathews testified that the subject of a survivor annuity never came up in her discussions with Christine.

I also find incredible appellant's statements to the effect that Christine would not have resigned on August 2, [page 14] 1985, if she had known that her husband's entitlement to a survivor annuity would end on that date. By their signatures on the retirement refund application forms, both appellant and Christine clearly agreed to terminate any right appellant might have

to a survivor annuity. As there is no evidence that Christine was suffering from a serious or terminal illness or that either she or appellant contemplated her having an accident, I find it highly unlikely that Christine would have changed the effective date of her resignation even if she had known that appellant's entitlement to a survivor annuity ended on the date of her termination. To a 38-year old woman, the possibility of death within the following month would appear remote. What concerned Christine more at the time was starting a new life and obtaining the refund of her retirement contributions in order to purchase a house; this was facilitated by having her resignation effective the date she finished work.

Even assuming appellant is correct in his contention that Christine made a request for LWOP which was denied, this would not render her resignation involuntary. The

granting of LWOP is a matter of administrative discretion and employees are not entitled to LWOP as a matter of right. Abrams v. Department of the Navy, 22 M.S.P.R. 480, 485 (1984), aff'd, 770 F.2d 181 (Fed. Cir. 1985) (Table). Furthermore, the agency had a legitimate reason for denying Christine LWOP. See Appellant Exhibit 55, Hours of Duty and Absence and Leave Handbook at 0601-51, section 351.4. Christine would not be returning to a position with the IRS as she was moving to Oregon and had taken a job in the private sector. Thus leave would cause encumbrance of a position without benefit to the IRS. Christine had not shown a need as she would have medical coverage and life insurance up until she started her new job. The matter of extending entitlement to a survivor annuity and accidental [page 15] death benefits to a spouse for thirty days is not of sufficient magnitude to warrant the

granting of LWOP. See Appellant Exhibit 55, Hours of Duty and Absence and Leave Handbook at 0601-51, section 351.4.

I find appellant has failed to establish that Christine would not have resigned on August 2, 1985, except for misinformation or deception on the part of OPM or the IRS with respect to a survivor annuity or accidental death benefits. A preponderance of the evidence shows that Christine's resignation was voluntary. See Filliben v. Department of the Navy, 34 M.S.P.R. 31 (1987) (appellant did not establish that he was misled by agency statements or that the information was so pivotal to his decision to resign as to render it involuntary).

Christine's resignation was effective August 2, 1985.

As previously discussed, Christine established the effective date of her resignation as August 2, 1985. The fact

that the resignation was not processed or approved by agency officials until August 6 and 7, 1985, does not alter the effective date. See 5 C.F.R. § 715.202(a) (1988) (an employee may set the effective date of his resignation). See also testimony of Mildred Mathews (not uncommon for a resignation to be processed after its effective date).

Appellant is not entitled to a survivor annuity.

Appellant's wife died on August 6, 1985, four days after the effective date of her resignation from her position with the IRS. Furthermore, she had not retired under the Civil Service Retirement Act. Thus, appellant has not established his entitlement to a survivor annuity. See 5 U.S.C. §§ 8341(b)(1) and 8341(d).

[page 16] DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: ss//Carol J. Teather
Administrative Judge

[Text concerning only appeal rights deleted]

APPENDIX - 41

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[Remainder of table of contents deleted]

## APPENDIX - 44

[The below memorandum was on a printed form. The printed material is in boldface; all other material was handwritten on the form.]

**Conference or Contact Memorandum**

**Method of Contact:Telephone/In Person:**[blnk]
**Date:** [blank]
**Time:** [blank]
**Initiator:** C Demaduk
**Person Contacted or name of Participants:**
Doug Turkot Millie Mathews
**Office or Place of Conference:** Office
**Reference:** Christine Allen

**Subject Matter/Remarks:** Per Ms Mathews C. Allen never officially requested LWOP. Approximately 3 mths before, she had visited up to Oregon she had discussed LWOP w/ Ms Mathews but never requested it. When she visited Oregon she checked to see if there were any jobs w/IRS & was told that nothing would be available for 1 year. "freeze" When she came back, she discussed the fact that she had gotten another job outside the IRS. She was concerned however about her life & health insurance & was she covered. LWOP was discussed in regards to covering her for health & life insurance. Ms Mathews contacted me @ that and was told that an employee was covered for 31 days after they quit for health and Life.

Ms. Allen decided to resign since her job started at the 1st of the month and would be covered then. The 31 days coverage would cover her up until the new job.

**Signature:** ss C. Demaduk
**Date:** 10/31/85

CSRS

# APPLICATION FOR REFUND OF RETIREMENT DEDUCTIONS

## CIVIL SERVICE RETIREMENT SYSTEM

To avoid delay in payment (1) Complete applicable items in full, (2) Type/print in black ink.

Form Approved (Next No. 3206-0136) Expires 8-31-86

1 Name (last, first, middle)
ALLEN, CHRISTINE GUERIN

2 Date of birth (Month, day, year)
2/8/47

3 Social Security Number
516-52-1557

4 Are you a citizen of the United States of America? [X] Yes [ ] No

5 List all other names you have used (including maiden name) and dates used
GUERIN

6 Previous claim number shown (shown on by CSC)

Retirement Annuity [ ] Refund [ ] Deposit or Redeposit [ ] Voluntary Contributions

7 List below all of your civilian and military service for the United States Government or District of Columbia

| Department or Agency (Including Bureau, Branch or division where employed) | Location of Employment (City, State and ZIP Code) | Title of Position | Periods of Service: Beginning Date | Periods of Service: Ending Date | Indicate whether CS retirement deductions were withheld from your salary (Check) | | Were you paid deposit or refunded for any period including service after 1956? (Check) | |
|---|---|---|---|---|---|---|---|---|
| | | | | | Withheld | Not withheld | Yes | Not Paid |
| U.S. MARINE CORP | U.S. MARINE CORPAIR STATION EL TORO, CA 92709 | PD2271 VOUCHER EXAMINER | 9/29/80 | 10/1/81 | ✓ | | | |
| IRS | COMPTROLLER J139/DISBURSING 3A CIVIC CENTER PLAZA PO BOX C 13649 SANTA ANA, CA, 92712 | TAX AUDITOR | 10/1/81 | 8/2/85 | ✓ | | | |

8 Have you ever applied for retirement benefits under the Federal or District of Columbia Government or arranged for such benefits to become effective within 31 days from the ending date of your last period of service? [ ] Yes — Complete items 9, 10, 11 and 12 [X] No

9 Do you now have, or have you been informed that you will be entitled to, a deferred annuity or annuity beginning on a future date? [ ] Yes [ ] No

10 Date of your separation (If date not known, enter approximate)

11 Department or agency (including bureau, branch or division) in which you are (or will be) employed

12 Location of new employment (City, State and ZIP Code)

13 Indicate below whether you wish to have Federal income tax withheld from the interest portion of your refund.

[X] Withhold Federal income tax from the interest portion of my refund payment
If you elect withholding, the amount withheld will be 5% of the total interest payable

[ ] Do not withhold Federal income tax from the interest portion of my refund payment

14 Are you now married? [X] Yes — Give name of current spouse: William R. Allen [ ] No

15 Have you performed a total of at least 10 months of civilian service for which retirement deductions were withheld?

[X] Yes — Complete item 15a [ ] No

15a Have you been divorced from anyone after May 8, 1985?

[ ] Yes — In the space provided on the back of this form list all living former spouses from whom you were divorced after May 8, 1985 and to whom you were married for at least 9 months. [X] No

## APPLICANT CERTIFICATION

16 I understand that I am not legally entitled to receive a refund if I am reemployed or otherwise assigned to a position under the Civil Service Retirement System within 31 days of separating from my most recent position. I agree to notify OPM if I am employed again within this time period and will return or repay any refund paid to me under these circumstances.

I hereby certify that all statements in this application, including any information I have given on the back, are true to the best of my belief and knowledge and that the tax withholding election made here reflects my wishes.

Your signature (Do not print) Christine G Allen — Date 7/31/85

WARNING — Any intentional false statement in this application or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 imprisonment of not more than 5 years, or both. (18 U.S.C. 1001)

## ADDRESS FOR MAILING REFUND CHECK

17 Number and Street

Telephone Number (Including area code)

City, State and ZIP Code

**WE CANNOT AUTHORIZE PAYMENT IF THIS ADDRESS IS ERASED OR OTHERWISE CHANGED**

NOTE: This application should not be offered to a financial institution or other person as collateral or security for a loan. The retirement law (5 U.S.C. 8346(a)) provides that an employee's retirement contributions are not assignable. A former employee must apply for refund personally and payment must be made directly to him or her. However, outstanding debts to the U.S. Government can, at the Government's request, be withheld from a refund, provided all legal requirements are met.

See the back of this form for important information concerning your application for refund of retirement deductions and for a Privacy Act Statement.

## FOR AGENCY USE ONLY

I certify that this agency received this OPM Form 1495 on the date shown below.

Signature of Agency Official — Date this record

Title — Agency Payroll Office Number

OPM Form 1495 (Previous Editions Obsolete) — REPRODUCE LOCALLY — SEE BACK FOR MORE INFORMATION — OPM Form 1495 (Back) May 1985

# Appendix - A46

Attachment 5 to FPM Ltr. 831- (2)

If you answered "yes" to items 15 and 15a, list all living former spouses from whom you were divorced after May 6, 1985, and to whom you were married for at least 9 months.

| Name of Former Spouse | Date of Marriage (MM dd yy) | Date of Divorce (MM dd yy) |
|---|---|---|
| | | |
| | | |
| | | |

## NOTIFICATION TO CURRENT AND FORMER SPOUSES OF YOUR REFUND APPLICATION

The Civil Service Retirement law provides that your retirement contributions may be refunded to you ONLY if you notify the following persons that you are applying for a refund:

- any current spouse and
- any former spouse from whom you were divorced after May 6, 1985.

You are not required to notify a former spouse if you were not married to that person for a total of at least 9 months or you do not have a total of at least 18 months of civilian service subject to retirement deductions.

You should provide a copy of OPM Form 1537, *Current/Former Spouse's Notification of Application for Refund of Retirement Deductions*, (which you may get from your employing office: (1) your current spouse, if any, and (2) if you have at least 18 months of civilian service subject to retirement deductions, each former spouse you listed above. The current or former spouse must sign the form and have the signature witnessed by two persons. You cannot be one of the witnesses.

In addition, the law provides that payment of your refund is subject to the terms of any court order related to a divorce that occurred after May 6, 1985, that expressly relates to any portion of your refund. If the payment of the refund would end the entitlement of a former spouse to a survivor annuity or a portion of your annuity.

Attach all signed and witnessed notification forms to your refund application.

If you are unable to obtain a signed and witnessed form from your current spouse or a former spouse, you should submit with your refund application one of the following:

1. a signed postal return receipt to show that the notification was delivered to the address of the current or former spouse, OR
2. notarized statements by two individuals who witnessed you notifying or attempting to notify the current or former spouse of your refund application, OR
3. if the person is a former spouse, a certified copy of a court order or decree (divorce decree or community property settlement) that awards all interest in the annuity to you or states that the former spouse has given up all rights to your annuity.

If you do not know the current whereabouts of a spouse or former spouse, the Office of Personnel Management may grant you a waiver of the requirement to notify that person. A waiver may be granted if you submit with your refund application:

1. a determination by a court or administrative agency empowered to make such determinations that the person is missing, OR
2. notarized statements from yourself and two other persons (one of whom is unrelated to you) stating that the person's whereabouts are unknown and detailing efforts to locate the person.

### Notice to Applicant

1. If you have more than 5 years of service, you may be entitled to annuity rights which will be forfeited by payment of this refund unless you are later reemployed subject to the Civil Service Retirement law. (Note: Payment of the refund will end any eligibility your former spouse(s) may have to coverage under the Federal Employees Health Benefits Program.)
2. If you were separated on or after October 1, 1956, from a position subject to the Civil Service Retirement law, refund of retirement deductions is prohibited unless your separation occurred and your application is received by your employing agency or the Office of Personnel Management at least 31 days before the earliest commencing date of any annuity for which you are eligible.
3. Refund of retirement deductions is also prohibited if you are currently employed in a position subject to Civil Service Retirement deductions or will be so employed within 31 days from the date of the separation on which your claim for refund is based.
4. Your refund is not payable until at least 31 days have passed since your separation.
5. Interest will be paid on your refund if you have more than 1 year, but fewer than 5 years, of service.

### Federal Tax Withholding

Although the refund of your contributions to the Civil Service Retirement fund is not subject to Federal income tax, any interest paid on your contributions is taxable in the year that it is paid, unless you transfer the interest portion of your refund to another eligible retirement plan. If you elect not to have Federal tax withheld, or if you do not have enough Federal tax withheld, you may be responsible for payment of estimated tax. In addition, you may incur penalties under the estimated tax rules if your withholdings and estimated tax payments are not sufficient.

### Privacy Act Statement

Title 5, U.S. Code, Chapter 83, Civil Service Retirement, authorizes collection of this information. The data you furnish will be used to determine your eligibility to receive a refund of retirement deductions.

This information may be shared with Federal, state, local, or other charitable or social security administrative agencies to determine and issue benefits under their programs, or with law enforcement agencies when they are investigating a violation or potential violation of the civil or criminal law.

Executive Order 9397 (November 22, 1943) authorizes use of the Social Security number to distinguish you and people with similar names. Furnishing your Social Security number, as well as other data, is voluntary, but if you do not do this, OPM may be unable to determine your eligibility to receive a refund of retirement deductions.

### Where to File Your Application

1. If you have been separated 30 days or less, this application should be forwarded to the office in which you were last employed.
2. If you have been separated more than 30 days, forward this application to the Office of Personnel Management, Civil Service Retirement System, Employee Service and Records Center, Boyers, PA 16017.

CURRENT/FORMER SPOUSE'S NOTIFICATION OF APPLICATION FOR REFUND OF RETIREMENT DEDUCTIONS
Under the Civil Service Retirement System
(See Privacy Act Statement on back.)

If you apply for a refund of retirement deductions after May 6, 1985, you must notify your current spouse. Also, you must notify any former spouse if all the following conditions apply:

1. You have 18 months of service subject to retirement deductions (including previously refunded service);
2. You were married to the former spouse for at least 9 months, and
3. You were divorced after May 6, 1985.

PART 1—TO BE COMPLETED BY APPLICANT

INSTRUCTIONS: To notify each current or former spouse of your application for a refund of your retirement deductions, complete Part 1 and have the current or former spouse complete Part 2. The current or former spouse's signature must be witnessed in Part 3. You may not be a witness. (Use a separate form for current spouse and each former spouse.)

| Name | Date of Birth | Social Security No. |
|---|---|---|
| Christine G. Allen | 2/8/47 | 516-52-1557 |

PART 2—TO BE COMPLETED BY CURRENT OR FORMER SPOUSE

INSTRUCTIONS: Complete Part 2 and have two witnesses complete Part 3. Payment of the refund of retirement deductions will end any entitlement you may have to a survivor annuity or portion of any annuity to which the applicant would otherwise have been entitled (unless the applicant's entitlement is restored through later Federal employment.) If a court order expressly relates to the refund and you believe that payment of the refund would end a court-ordered entitlement you have to a survivor annuity or to a portion of an annuity to which the above-named person is entitled, see the information on the back regarding such court orders.

I have read the paragraph above and I understand that the above-named individual is applying for a refund of civil service retirement deductions.

| Signature (Do not print) | Name (Type or Print) | Date Signed |
|---|---|---|
| William D Allen | William D. Allen | 1 August 1985 |

PART 3—TO BE COMPLETED BY WITNESSES

We, the undersigned, certify that Part 2 of this form was signed by the current or former spouse of the person named in Part 1 in our presence.

| Signature | Date Signed | Signature | Date Signed |
|---|---|---|---|
| S Santfort | 1 Aug 85 | George M Allen | 1 Aug 85 |
| **Name of Witness (Type or Print)** | | **Name of Witness (Type or Print)** | |
| SABRINA SANTFORT | | George M. Allen | |
| **Address** (Number and Street) | | Address (Number and Street) | |
| MAG-13 - 3d MAW | | 307 Bunnell St. | |
| (City, State and Zip Code) | | (City, State and Zip Code) | |
| MCAS El TORO, CA | | Anchorage, Alaska 99505 | |

Office of Personnel Management
MAY BE REPRODUCED LOCALLY
OPM Form 1337
May 1985

INFORMATION ABOUT SENDING COURT ORDERS TO THE OFFICE OF PERSONNEL MANAGEMENT (OPM)

If you are a separated or divorced spouse of the individual named in Part 1 of this form and you have a court order that (1) expressly relates to any portion of the applicant's retirement deductions (contributions) and (2) payment of the refund would end your entitlement to a survivor annuity or a portion of an annuity to which the applicant is entitled, you should send a copy of the court order to OPM with a cover letter giving:

1. The name, date of birth, and social security number of the person applying for the refund;

2. Your statement that the court order has not been amended, superseded, or set aside;

3. Your name, date of birth, and mailing address; and

4. If any payments to you are subject to termination upon your remarriage*, a statement that either (1) you have remarried and the date of the remarriage or (2) that you have not remarried and that you will notify OPM within 15 days of a remarriage should you remarry in the future.

If the court order gives you a survivor annuity after the death of the applicant, also attach a copy of your birth certificate, if available.

The court order can be honored ONLY if it is received before the refund is paid to the applicant. Payment of the refund will end any entitlement you may have to a survivor annuity or a portion of any annuity to which the applicant would otherwise have been entitled. Payment of the refund will also end any eligibility you may have to coverage under the Federal Employees Health Benefits Program.

Send the copy of the court order and your cover letter to:

Office of Personnel Management
Civil Service Retirement System
Employee Service and Records Center
ATTN: Refunds
Boyers, PA 16017

*A former spouse who remarries before reaching age 55 is not entitled to a survivor annuity. (Termination of the remarriage does not restore entitlement to a survivor annuity.) Remarriage does not affect a former spouse's court-ordered right to receive a portion of an annuity during the annuitant's lifetime, unless the court order provides otherwise.

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PRIVACY ACT STATEMENT: Public Law 98-615, which established current and former spouse notification requirements, authorizes solicitation of this information. The data furnished will be used to determine whether the refund can be paid to the applicant. This information may be shared with national, state, local, or other charitable or social security administrative agencies to determine and issue benefits under their programs or when they are investigating a violation or potential violation of the civil or criminal law. Executive Order 9397 (November 22, 1943) authorized use of the Social Security Number to distinguish between the applicant and people with similar names. Furnishing the Social Security Number, as well as the other data, is voluntary, but failure to do so may result in our inability to refund the retirement deductions.